MOTION FILED
FEB 22 1989

(9)

No. 88-525

In The

Supreme Court of the United States

October Term, 1988

FEDERAL COMMUNICATIONS COMMISSION, ET AL.
Appellants and Cross-Appellees,

vs.

SABLE COMMUNICATIONS OF CALIFORNIA, INC.
Appellee and Cross-Appellant

On Appeal from the United States District Court for the Central District of California

BRIEF AMICI CURIAE OF CITIZENS FOR DECENCY THROUGH LAW, INC., THE CHRISTIAN LIFE COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, AND REBECCA C., INFANT, BY AND THROUGH HER PARENTS PAULETTE CALLEN AND GARY CALLEN IN SUPPORT OF APPELLANTS AND CROSS-APPELLEES AND MOTION FOR LEAVE TO FILE

BENJAMIN W. BULL
2845 E. Camelback Rd.
Suite 740
Phoenix, AZ 85016
(602) 381-1322

Counsel of Record
Amici Curiae

BEST AVAILABLE COPY

76 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	iii
MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE.....	vii
INTEREST OF AMICI CURIAE.....	1
SUMMARY OF ARGUMENT.....	5
LAW AND ARGUMENT.....	7
I. CONGRESS MAY PROHIBIT INDECENT DIAL-A-PORN RECORDINGS. IT IS NOT LIMITED TO A BAN ON OBSCENE RECORDINGS.....	7
A. When There is Sufficient Need This Court Has Regularly Limited Nonobscene Expression.....	9
B. Section 223(b) is Not Unconstitutionally Overbroad on its Face or as Applied Because it Regulates a "Central Core of Constitutionally Regulable Conduct".....	17
1. Congress intended that the term "indecent" be applied consistently with the Supreme Court's mandate in F.C.C. v. Pacifica, where the Court held that "indecency" defined a course of conduct subject to government regulation....	19

2. The "indecency" standard in section 223(b) is not overbroad as used in the context of the commerical telephone medium..... 29

3. As construed in its application to the regulation of "indecent" telephone services, section 223(b) is not substantially overbroad..... 38

C. Section 223(b) is Not Directed at a Particular Viewpoint. It Proscribes Only the Mode or Form of Expression, Not the Ideas the "Indecent" Language May Purport to Convey..... 47

D. Where the Interests of Children are at Stake the Government is Fully Justified in Reguating Non-obscene Speech..... 49

E. Butler v. Michigan Does Not Foreclose a Prohibition on Commercial "Indencent" Telephone Recordings. Adults Can Easily Obtain Such Recordings Elsewhere..... 55

II. CONGRESS MAY PROHIBIT OBSCENE DIAL-A-PORN RECORDINGS..... 60

CONCLUSION..... 63

CERTIFICATE OF SERVICE..... 64

TABLE OF AUTHORITIES

Cases	Pages
Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986)	17, 27
Board of Education v. Pico, 457 U.S. 853 (1982)	16, 28
Broadrick v. Oklahoma, 413 U.S. 601 (1973)	40, 41,43
Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985)	38, 44,60
Butler v. Michigan, 352 U.S. 380 (1957)	24, 38,55
Carlin Communications, Inc. v. FCC, 749 F.2d 113 (2d Cir. 1984)	32
Carlin Communications, Inc. v. FCC, 787 F.2d 846 (2d Cir. 1986)	34
Carlin Communications, Inc. v. FCC, 837 F.2d 546 (2d Cir. 1988)	34
Carlin Communications, Inc. v. Mountain States Tel. & Tel., 827 F.2d 1291 (9th Cir. 1987)	35, 46,61
C.B.S. v. Democratic National Committee, 412 U.S. 94 (1973)	15

Chaplinski v. New Hampshire,
315 U.S. 568 (1942)..... 12

City of Newport v. Iacobucci,
479 U.S. 92 (1986)..... 17

Dun & Bradstreet v. Greenmoss
Builders,
472 U.S. 749 (1985)..... 15

Erznoznik v. City of Jacksonville,
422 U.S. 205 (1975)..... 30,
54

FCC v. Pacifica Foundation,
438 U.S. 726 (1978)..... 6,
9,14,16,19,51

Frisby v. Schultz,
487 U.S. ____, 108 S.Ct. 2495, 101
L.Ed.2d 420 (1988)..... 15,
43

Ginsberg v. New York,
390 U.S. 629 (1968)..... 16,
28,51

Greer v. Spock,
424 U.S. 828 (1976)..... 16

Hamling v. United States,
418 U.S. 87 (1974)..... 62

Hustler Magazine v. Falwell,
458 U.S. ____, 108 S.Ct. 876, 99
L.Ed.41 (1988)..... 15

Interstate Circuit, Inc. v. Dallas,
390 U.S. 676 (1968)..... 54

Jacobellis v. Ohio,
378 U.S. 184 (1964)..... 55

Jones v. North Carolina Prisoners Union,
433 U.S. 119 (1977)..... 16

Joseph Burstyn, Inc. v. Wilson,
343 U.S. 495 (1952)..... 30

Kaplan v. California,
413 U.S. 115 (1973)..... 61

Lehman v. Shaker Heights,
418 U.S. 298 (1974)..... 15

Manuel Enterprises v. Day,
370 U.S. 478 (1962)..... 25

Miller v. California,
413 U.S. 15 (1973)..... 9, 54,60,62

New York v. Ferber,
458 U.S. 747 (1982)..... 6, 14,16,40,41,50,54

New York State Club Assn. v. City of New York,
487 U.S. ____, 108 S.Ct. 2225, 101 L.Ed.2d 1 (1988)..... 43

Prince v. Massaschusetts,
321 U.S. 158 (1944)..... 50

Renton v. Playtime Theatres, Inc.,
475 U.S. 41 (1986)..... 16

Rowan v. Post Office Dept.,
397 U.S. 728 (1970)..... 15

Southeastern Promotions Ltd. v. Conrad,
420 U.S. 546 (1975)..... 30

United States v. Lampley,
573 F.2d 783 (3rd Cir. 1978)..... 61

United States v. Raines,
362 U.S. 17 (1960)..... 40

United States v. Sandy,
506 F.2d 210 (6th Cir. 1979)..... 62

Young v. American Mini Theatres,
427 U.S. 50 (1976)..... 12,
14,16

Statutes

47 U.S.C. Section 223(b)..... 2,
3,6,17,27,61,63

18 U.S.C. Section 1461..... 25

18 U.S.C. Section 1464..... 20,
21,26

Other Authorities

American Constitutional Law
L. Tribe, §§12-18..... 12,
45

Creating Levels of Constitutional Speech,
4 Hastings Const. L. Q. 321
(1977)..... 12

132 Cong. Rec. S14049
(September 27, 1986)..... 2

133 Cong. Rec. S16796
(December 1, 1987)..... 2

134 Cong. Rec. H1691
(December 1, 1987)..... 2

Restrictions of Speech Because Of Its Content: The Peculiar Case of Subject Matter Restrictions,
Stone, U. of Chi. L. Rev. 81
(1978)..... 12

Televised Violence: First Amendment Principles and Social Science Theory,
Krattenmaker & Powe
64 Va. L. Rev. 1123 (1978)..... 12

The Supreme Court, 1975 Term,
90 Harv. L. Rev. 58 (1976)..... 12

Where Do You Draw The Line?,
Cline, Victor B., (Brigham University Press, (1974)..... 11

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

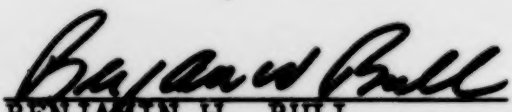
Citizens for Decency through Law, Inc. (CDL), the Christian Life Commission of the Southern Baptist Convention, and Rebecca C., by and through her parents Paulette Callen and Gary Callen hereby respectfully move for leave to file the attached brief amici curiae in this case. The consent of the attorney for Appellants and Cross-Appellees has been obtained. The consent of the attorney for the Appellee and Cross-Appellant was requested telephonically and by correspondence. He failed to respond, so it is assumed that his consent is refused.

The interests of the joint amici curiae is set out below.

In the instant case in the District Court, Appellants and Cross-Appellees did not urge an interpretation of the "indecency" standard consistent with this Court's nuisance rationale for the application of that standard in FCC v. Pacifica, 438 U.S. 726 (1978).

Since it is likely that Appellants and Cross-Appellees may pursue the same course in this Court, it is believed that the brief which amici curiae are requesting permission to file will contain a more complete argument on this constitutional issue. If this argument is accepted, it will be dispositive of this case.

Respectfully submitted,



BENJAMIN W. BULL
Counsel for Citizens
for Decency through
Law, Inc., the
Christian Life
Commission of the
Southern Baptist
Convention, and Rebecca
C., by and through her
parents Paulette
Callen and Gary Callen.

2845 E. Camelback Rd.
Suite 740
Phoenix, AZ 85016
(602) 381-1322

INTEREST OF AMICI CURIAE

Interest of CDL

Citizens for Decency through Law, Inc. (CDL) is a non-profit legal organization founded in 1957 by attorney Charles H Keating, Jr. Mr. Keating was a member of the 1970 Presidential Commission on Obscenity and Pornography. CDL exists to assist public officials in the enforcement and drafting of constitutional obscenity and pornography laws. It also provides legal assistance to victims of pornography such as joint amici curiae, four-year-old Rebecca C. CDL also provides public information on legal and social issues related to pornography and on sexual exploitation and victimization by pornographers. CDL has a legal staff of attorneys practicing exclusively in the

First Amendment/pornography area. CDL's attorneys drafted legal memoranda in support of the amendments to 47 U.S.C. section 223(b) of the Child Pornography and Obscenity Enforcement Act of 1988, the subject of the instant litigation. CDL's memoranda were published in the Congressional Record on three separate occasions. See 134 Cong. Rec. H1691 (April 19, 1988); 133 Cong. Rec. S16796 (December 1, 1987); 132 Cong. Rec. S14049 (September 27, 1986). CDL has filed over fifty briefs in the United States Supreme Court and has participated in trials and appeals in more than 40 states. It has over 120 affiliated chapters across the nation representing over 100,000 supporters.

CDL is profoundly concerned about the victimization and exploitation of children by commercial telephone pornog-

raphers. It believes that in order to ensure a decent and healthy society, proscriptions against "indecent" and "obscene" commercial telephone recordings under 47 U.S.C. section 223(b) must be upheld.

Interest of the Christian Life Commission of the Southern Baptist Convention

The Christian Life Commission of the Southern Baptist Convention is an agency of the Convention which assists Southern Baptists in understanding the moral demands of the Christian faith and helps Southern Baptists apply Christian principles to moral and social problems. The Southern Baptist Convention is the largest Protestant denomination in the United States. It has more than 37,000 member churches with approximately 14.8 million members.

On June 16-18, 1987, at its meeting in St. Louis, Missouri, the South-

ern Baptist Convention enacted its "Resolution on Pornography." Among other things, it recognized that the "primary users of" pornographic telephone recordings "appear to be America's teenagers." It called upon all Southern Baptists to oppose the exploitation of America's children by commercial telephone pornographers. The Resolution called upon Congress to enact the very legislation challenged in the instant appeal.

Interest of Rebecca C., Infant

Rebecca C. is a four-year-old female child who was raped by a 12-year-old male child after he was exposed to two-and-one-half hours of "indecent" and "obscene" dial-a-porn recordings. The 12-year-old boy accessed these recordings while at church on a telephone in a pastor's study.

The boy was incited by these sexually explicit recordings to act out what the recorded female voice urged him to do; he compelled the four-year-old child to orally copulate him. In addition to her physical injuries, Rebecca C. was emotionally and psychologically traumatized. Rebecca C., by and through her parents, Paulette and Gary Callen, has filed a $10 million suit against Pacific Bell, and the two commercial dial-a-porn vendors accessed by the 12-year-old boy. This suit, entitled Brian T., et. al. v. Pacific Bell (No. A041423) is currently pending in the Court of Appeal of the State of California.

SUMMARY OF ARGUMENT

Where a sufficient need exists, this Court has upheld limitations on

certain classes of nonobscene speech, including "indecent" speech. This is particularly true where, as here, "indecent" recordings are readily available for adults from alternate sources. Like the radio in F.C.C. v. Pacifica, the telephone is sufficiently intrusive and pervasive to support Congress's proscription on "indecent" recordings. Such a restriction strikes a balance, in which children are protected while adults still have access from other sources (i.e., "over the counter"). They are not reduced to hearing only what is fit for children.

Under New York v. Ferber, 47 U.S.C. section 223(b) is not substantially overbroad. Applied to the commercial telephone medium, the "indecency" standard regulates a central core of constitutionally regulable conduct.

By its very nature, the dial-a-porn industry amounts to "telephone broadcasting." Limited to this medium, the statute does not reach a substantial number of impermissible applications.

"Obscenity" is unprotected regardless of the medium of communication, including the telephone. If telephone pornographers choose to do business in multiple federal districts, they are constitutionally subject to liability in each district under varying community standards.

LAW AND ARGUMENT

I. CONGRESS MAY PROHIBIT INDECENT DIAL-A-PORN RECORDINGS. IT IS NOT LIMITED TO A BAN ON OBSCENE RECORDINGS.

A review of this Court's decisions in the First Amendment area shows great

deference to the values of free speech. It is also clear that where there is a compelling need to protect the public -- and particularly children -- from injurious speech, the Court has not embraced an absolutist position.[1] On the contrary, where it is shown that adults may easily obtain pornographic speech from other sources, this Court has evidenced a willingness to protect the privacy of unconsenting adults and the welfare of children by restricting pornographer's access to a particular medium. Indeed, where the need is sufficient, the Court has recognized

---

[1] The absolutist position would extend First Amendment protection to all speech, regardless of the harm, including child pornography. See testimony of Barry Lynn, Legislative Counsel, American Civil Liberties Union, before the Attorney General's Commission on Pornography, June 20, 1985, Washington, D.C. hearing.

certain categories of speech which are either unprotected or enjoy only limited protection under the First Amendment. The regulation of "indecent" dial-a-porn recordings should be such a category.

A. When There is Sufficient Need This Court Has Regularly Limited Nonobscene Expression.

In the landmark case F.C.C. v. Pacifica Foundation, 438 U.S. 726 (1978), this Court defined the word "indecent" as "nonconformance with accepted standards of morality." It is a "shorthand term for patent offensiveness." Id. at 740 n.15. This definition obviously does not coincide with the three-part definition of "obscenity" found in Miller v. California, 413 U.S. 15 (1973).

This Court, of course, has never limited government restrictions on speech to the obscenity standard. For example, this Court has upheld restrictions on all of the following types of speech: false advertising, speaking a prayer in a public school, libel, slander, speaking words which amount to a conspiracy or an obstruction of justice, sedition, yelling "fire!" in a crowded theatre, using words which constitute offering a bribe, words that threaten social harm because they advocate illegal acts, words (from a loudspeaker) at 3:00 a.m. in a residential neighborhood, speaking in contempt of court, committing perjury under oath, television cigarette advertisements, saying words which have been classified (e.g., secret) by the government, copyright violations, pretrial publicity which might interfere with a defen-

dant's opportunity to secure a fair trial, U.S. government employees engaging in political speech (Hatch Act), sexually explicit material which is harmful to minors, nonobscene sexually explicit movies shown in violation of a zoning ordinance, child pornography, and finally, "indecent" speech.[2] Thus, the broad contention that government restrictions on expression are limited to the obscenity standard is quite incorrect. Obviously the regulation of sexually-oriented expression has by no means been limited to that standard, although the degree of permissible regulation has varied with the circumstances.

---

[2] See, "Where Do You Draw the Line?, ed. Victor B. Cline (Brigham Young University Press, 1974).

The application of the "indecency" standard to dial-a-porn is supported by this Court's analysis of the First Amendment, which accords some varieties of speech (e.g., "indecent" speech) less protection than others.[3] The Court's rulings that certain types of expression are entitled to little or no protection under the First Amendment find their modern beginnings with Chaplinski v. New Hampshire, 315 U.S. 568 (1942), where the Court upheld a "fighting words" statute under which

---

[3] See, L. Tribe, American Constitutional Law, § 12-18 (1978); Krattenmaker & Powe, "Televised Violence: First Amendment Principles and Social Science Theory," 64 Va. L. Rev. 1123, 1207-1212 (1978); Stone, "Restrictions of Speech because of its Content: The Peculiar Case of Subject Matter Restrictions," 46 U of Chi. L. Rev. 81 (1978); Note, "Young v. American Mini Theatres, Inc.: Creating Levels of Protected Speech," 4 Hastings Const. L. Quarterly 321, 344-54 (1977); "The Supreme Court, 1975 Term," 90 Harv. L. Rev. 58 200-205 (1976).

Chaplinski had been convicted for calling a policeman "a god damned racketeer" and a "damned fascist." Id. at 569. Justice Murphy's rationale for upholding the statute against a First Amendment attack is set forth in the following excerpt from the opinion:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words -- those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Id. at 571-72.

In essence the Court has held that differing degrees of protection are afforded different classes of speech. Speech protected in some contexts may in others be so harmful, or of so little value, that it can be regulated because the harm to society outweighs the expressive interests. Thus, First Amendment protection "often depends on the content of the speech." Young v. American Mini Theatres, Inc., 427 U.S. 50, 66 (1976). Furthermore, as Justice Stevens has stated, "the First Amendment affords some forms of speech more protection from governmental regulation than other forms of speech," New York v. Ferber, 458 U.S. 747, 781 (1982) (Stevens, J. concurring), and the context of speech may determine whether or not it is protected. F.C.C v.

Pacifica, 438 U.S. at 747-48.[4] For instance see: Rowan v. Post Office Department, 397 U.S. 728 (1970) (banning erotic material from the mails at recipient request); C.B.S. v. Democratic National Committee, 412 U.S. 94 (1973)(upholding network refusal to accept commercial advertising); Lehman v. Shaker Heights, 418 U.S. 298 (1974) (upholding policy of accepting commercial advertisements but refusing political advertisements on city-owned bus

---

[4] More recently, in Dun & Bradstreet v. Greenmoss Builders, 472 U.S. 749 (1985) this Court observed that "[w]e have long recognized that not all speech is of equal First Amendment importance . . . Certain kinds of speech are less central to the interests of the First Amendment than others..." Id. at 758-59 n.5 "Indecent speech," unlike speech on issues of public concern, is not at the "heart" or the "core" of the First Amendment. Frisby v. Schultz, 487 U.S. ____, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988), Hustler Magazine v. Falwell, 485 U.S. ____, 108 S.Ct. 876, 99 L.Ed. 41 (1988).

line); Greer v. Spock, 424 U.S. 828 (1976) (barring political speakers from a military base); Jones v. North Carolina Prisoners Union, 433 U.S. 119 (1977) (banning in-prison solicitation of membership in a prisoners' union); Young v. American Mini Theatres, supra, and Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986)(placing zoning restrictions on the location of adult theatres); F.C.C. v. Pacifica, supra; Board of Education v. Pico, 457 U.S. 853 (1982)(certain books may be removed from a high school library because of their vulgarity); New York v. Ferber, supra (banning non obscene sexually explicit depictions of minors); Ginsberg v. New York, 390 U.S. 629 (1968) (banning distribution to minors of nonobscene material which is "harmful to minors");

Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986)(upheld restriction on "indecent" sexually suggestive language in a political speech by high school student); City of Newport v. Iacobucci, 479 U.S. 92 (1986)(upheld city ordinance banning nonobscene nude or nearly nude dancing in bars).

B. Section 223(b) is Not Unconstitutionally Overbroad on its Face or as Applied Because it Regulates a "Central Core of Constitutionally Regulable Conduct."

Sable Communications of California, Inc. ("Sable") argues that 47 U.S.C. § 223(b) is overbroad both facially and as applied to Sable and its affiliates.[5] The statute, Sable argues,

---

[5] Sable has provided no evidence that would support this Court's finding that the statute is overbroad "as applied." This is a pre-enforcement challenge, which necessitates a conclusion that the government has never applied this law to Sable or anyone else.

is overbroad because it regulates outside of the broadcasting context, because it fails to define "indecent" in the statute itself, and because supporting authority cited in the legislative history is "inapplicable." To the contrary, section 223(b) is constitutional because it regulates a "central core of constitutionally regulable conduct," and because it thus survives "substantial overbreadth" analysis. See infra at pp 29-47. Sable's reasoning fails because it leaps across critical legal issues in a sprint to advance the conclusion that "indecency" is not subject to regulation in the telephone medium. For proper analysis this issue must be broken down into several related issues. (1) Does the term "indecent" define a course of conduct subject to the government's regulation?

(2) Did Congress intend that the term "indecent" be applied consistently with the Court's mandates? (3) Can the telephone medium be regulated using the "indecency" standard? (4) Does the statute survive "substantial overbreadth" analysis?

1. Congress intended that the term "indecent" be applied consistently with the Supreme Court's mandate in F.C.C. v. Pacifica, where the Court held that "indecency" defined a course of conduct subject to government regulation.

Sable apparently concedes that Congress intended that the term "indecent" in section 223(b) be defined and applied consistently with the Supreme Court's opinion in F.C.C. v. Pacifica, supra. Sable argues, however, that Pacifica is inapplicable, and that no circumstances exist to permit the regulation of commercial "indecency" in the telephone medium.

An analysis of Pacifica and related decisions is necessary to determine whether the term "indecent" defines a course of conduct subject to regulation by the government. In Pacifica, the issue before the Court was whether the FCC had the power to regulate a radio broadcast that was "indecent" but not obscene under 18 U.S.C. § 1464. As stated another way by the Court, whether "when the Commission finds that a pig has entered the parlor, the exercise of its regulatory power" depends "on proof that the pig is obscene." 438 U.S. at 750-51.

The controversy in Pacifica related to the broadcast of the George Carlin "Filthy Words" monologue by a New York radio station at approximately 2 o'clock in the afternoon. This broadcast contained very graphic language relating to excretory and sexual activi-

ties or organs. The monologue was included by the Court in an appendix to its decision. 438 U.S. at 751-55. Reacting to a complaint concerning the broadcast, the FCC issued a declaratory order granting the complaint; finding that the language as broadcast was indecent as prohibited by 18 U.S.C. § 1464; and warning Pacifica that sanctions could have been imposed by the FCC, and might be imposed in the future, if additional complaints were received. 438 U.S at 730-32.

The ultimate ruling by the court in Pacifica was that the FCC did have the power to regulate an "indecent" broadcast, and that the government's power in this context goes beyond the proscription of that which is obscene.[6] The Court stated several

---

[6] The Court noted that "each medium

FOOTNOTE CONTINUED ON NEXT PAGE

reasons for its decision. First:

> [T]he broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder.

438 U.S. at 748 (Emphasis added).[7]

FOOTNOTE 6 CONTINUED
of expression presents special First Amendment problems," and that "of all forms of communication, it is broadcasting that has received most limited First Amendment protection." 438 U.S. at 748.

[7] See also, 438 U.S. at 731 n.2, where the Court elaborated on the pervasive nature of broadcasting, its availability to unsupervised children, and its invasion of the home. The Court recognized the similarity between offensive broadcasts and "harassing phone calls," stating:

> One may hang up on an indecent phone call, but that option does not give the caller a constitutional immunity to avoid a harm that has already taken place.

438 U.S. at 749 (Emphasis added).

Further, in support of its ruling the Court stated that:

> Second, broadcasting is uniquely accessible to children, even those too young to read. Although Cohen's written message might have been incomprehensible to a first grader, Pacifica's broadcast could have enlarged a child's vocabulary in an instant.

438 U.S. at 749 (Emphasis added).[8] In addition, the Court recognized the governmental interest in the "well-being of its youth" and "in supporting 'parents' claims to authority in their own household'," and "[t]he ease with which children may obtain access to broadcast material." 438 U.S. at 749-50. Finally, the Court was clear that its decision (and the FCC's) "rested entirely on a nuisance rationale under

---

[8] Similarly, most (if not all) first grade children can dial the telephone, and indecent dial-a-porn has the same instantaneous effect of enlarging a child's vocabulary and worse.

which context is all-important," requiring "consideration of a host of variables." 438 U.S. at 750. The Court rejected the contention that its ruling would "reduce adults to hearing only what is fit for children," violating the principle expressed in Butler v. Michigan, 352 U.S. 380 (1957). To the contrary, the Court stated that adults could hear this material through other mediums of communication. 438 U.S. at 750 n.28.

The Pacifica Court also defined the term "indecent" for purposes of its rejection of the overbreadth and First Amendment challenges. The Court referred in its opinion to the FCC's definition of "indecent," which had been used by the Commission in the issuance of its order regarding the "Filthy Words" broadcast. The FCC had defined "indecent" as follows:

> [L]anguage that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience.

438 U.S. at 732 (Emphasis added).

Elaborating, the Court stated:

> It is true that the Commission's order may lead some broadcasters to censor themselves. At most, however, the Commission's definition of indecency will deter only the broadcasting of patently offensive references to excretory and sexual organs and activities. While some of these references may be protected, they surely lie at the periphery of First Amendment concern.

438 U.S. at 743 (Emphasis added).[9]

In addition to this clear indication of

---

[9] The Court also cited an earlier decision relating to 18 U.S.C. § 1461, where Justice Harlan commented that "indecency" is a "shorthand term for 'patent offensiveness.'" 438 U.S. at 740 n.15 (quoting Manual Enterprises v. Day, 370 U.S. 478, 482 (1962)).

the types of conduct that would fall within the regulation of "indecency," the Court also identified as crucial to its decision that:

> [T]he Commission's decision rested entirely on a nuisance rationale under which context is all-important. The concept requires consideration of a host of variables. The time of day was emphasized by the Commission. The content of the program in which the language is used will also affect the composition of the audience, and differences between radio, television, and perhaps closed-circuit transmissions, may also be relevant.

438 U.S. at 750.[10]

In applying the "indecency" prohibition to the facts before the Court in Pacifica, the Court held that 18 U.S.C. § 1464 was not overbroad. The

---

10 See also, 438 U.S. at 732 n.6, noting the statement of Commission Chairman Wiley that "'indecency' is not an inherent attribute of words themselves; it is rather a matter of context and conduct."

very same facts and circumstances before the Court in Pacifica are present in a possible application of 47 U.S.C. § 223(b).

This Court's decision in Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986) is also relevant on the issue of overbreadth. The issue in Bethel was "whether the First Amendment prevents a school district from disciplining a high school student for giving a lewd speech at a school assembly." Id. at 677. The Court held:

> We hold that petitioner School District acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech.

Id. at 685 (Emphasis added).

The Court stated several reasons for its ruling, rejecting the student's claims that the school's disruptive-con-

duct rule was vague and overbroad. First, the Court noted that even the House of Representatives of the United States prohibits "indecent" language during debate and other proceedings, and that "Senators have been censured for abusive language directed at other Senators." Id. at 682. The Court cited Ginsberg v. New York and Board of Education v. Pico for the proposition that:

> This Court's First Amendment jurisprudence has acknowledged limitations on the otherwise absolute interest of the speaker in reaching an unlimited audience where the speech is sexually explicit and the audience may include children.
>
> * * *
>
> These cases recognize the obvious concern on the part of parents, and school authorities acting in loco parentis to protect children -- especially in a captive audience -- from exposure to sexually explicit, indecent, or lewd speech.

478 U.S. at 684 (Emphasis added). Finally, the Court cited Pacifica for the authority that the Court has "recognized an interest in protecting minors from exposure to vulgar and offensive spoken language." Id. Therefore, the Court in Bethel reaffirmed its willingness to restrict the rights of speakers where the speech is "indecent," and where the speaker's audience includes children.

2. The "indecency" standard in section 223(b) is not overbroad as used in the context of the commercial telephone medium.

Having shown that section 223(b) can be construed to regulate a definable and specific course of conduct consistent with Pacifica, the issue remains as to whether the telephone medium is sufficiently comparable to the "broadcast" at issue in Pacifica

to justify the similar regulation in this context.

The Court left this issue open in Pacifica, where it stated in regard to "context" that "differences between radio, television, and perhaps closed-circuit transmission, may also be relevant." 438 U.S. at 750. Indeed, this Court has repeatedly recognized that "each medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems." Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546, 557 (1975). Each communication medium is subject to its own specific set of rules. Pacifica at 747; Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502-503 (1952). And the resolution of each case ultimately must depend upon its own particular facts. Erznoznik v. City of Jacksonville, 422 U.S. 205

209 (1975). The Court emphasized in Pacifica that of all media, the broadcast medium is given the least protection under the Constitution. 438 U.S. at 748. The similarities between the radio broadcast medium in Pacifica and the telephone dial-a-porn medium are overwhelming. Sable does not provide any blocking, subscription, credit card or other child screening technologies. Any child can access Sable's telephone recordings anytime and virtually anyplace.

It is important to recognize that Sable's dial-a-porn business does not involve situations in which one adult calls another to engage in a private and spontaneous conversation. To the contrary, Sable's Complaint, para. 6-7 alleges:

> 6. "Dial-It," or "976 Information Access Service" ("976-IAS"), is now offered by the former Bell

operating companies, such as Pacific Bell. Such service allows private information to callers for a fee. Nationwide, these facilities are accessible only by dialing the prefix "976," which provides connection to unique access lines.

7. Calls to "976 IAS" numbers are routed over specialized interoffice trunks that are designed to handle large volumes of calls; a similar service cannot be handled with ordinary business lines. The network design of "976 IAS", by interconnecting telecommunications and computer equipment and facilities, permits hundreds of persons hourly to voluntarily access a prerecorded message by dialing a designated telephone number. The common carrier telephone companies assign these specialized lines to providers such as SABLE . . . .

(Emphasis added).

The broadcast nature of this medium is abundantly clear from previous litigation over Sable's commercial dial-a-porn businesses. In Carlin Communications, Inc. v. F.C.C., 749 F.2d 113, 114 (2nd Cir. 1984) ("Carlin

I"), the Court observed about Sable's business:[11]

> Carlin Communications, Inc. provides a telephone "service," colloquially called "dial-a-porn," to local and long distance callers at ordinary rates. The callers hear prerecorded messages, which change several times daily as in the case of weather or sports results, describing actual or simulated sexual activity apparently in explicit terms. A dial-it service can receive up to 50,000 calls per hour to an individual number, and , rather incredibly, 800,000 calls per day were made to dial-a-porn in May, 1983; 180,000,000 calls in the year ending February, 1984. Dial-a-porn, accessible by calls to or in the Metropolitan New York area codes 212, 516, and 914, all to the 976 exchange, was far more popular than the horserace results, the second most popular dial-it service,

---

[11] In Sable's Complaint, para. 8, it is alleged as fact that Sable and Carlin Communications, Inc. are affiliated corporations, at least since November, 1983.

> which received 79,000 calls per day or 29,000,000 per year. Eighty percent of dial-a-porn calls are local, and twenty percent long distance.

(Emphasis added). In Carlin Communications, Inc. v. F.C.C., 787 F.2d 846, 848 (2d Cir. 1986) ("Carlin II"), the Court found as fact:

> We note that for the six months ending April, 1985, dial-a-porn calls appear to have leveled off at 6 to 7 million per month . . . .

(Emphasis added). In Carlin Communications, Inc. v. F.C.C., 837 F.2d 546, 550 (2d Cir. 1988) ("Carlin III"), the Court found:

> The Commission released its Third Notice of Proposed Rulemaking on July 18, 1986, some three months after our decision in Carlin II. The Commission first observed that total calling volume to the New York Telephone and New England Telephone and Telegraph Companies' ("NYNEX") "dial-it" system had declined from 471 million calls in 1984 (1.29 million per day) to 159 million calls

> in the months of January to April 1985 (435,000 per day). Of these, 97 million were made to "adult entertainment numbers" in 1984 (266,000 per day), while 26 million (72,000 per day) were made to such numbers between January and April 1985. In fact, NYNEX had reported that, during the first four months of 1985, total MAS calling volume had risen to 1.32 million calls per day while adult entertainment calls had dropped to 218,000 per day.

(Emphasis added). Finally, in Carlin v. Mountain States Tel. & Tel., 827 F.2d 1291, 1294 (1987), the Ninth Circuit found:

> The technology of that network differs fundamentally from that of basic phone service. As pointed out above, individuals do not speak to each other on the 976 lines. Instead, "over 7,900 callers can be connected simultaneously to the same recorded message." Under these circumstances the telephone is serving as a medium by which Carlin broadcasts its messages. The phone company resembles less a common carrier than it does a small radio station.

(Emphasis added).

These factual findings regarding Sable, together with the allegations in its Complaint, do not support its claim that Pacifica is inapplicable and that "indecent" material cannot be regulated in the telephone medium. The Ninth Circuit's conclusion that the phone company resembles "a small radio station" appears correct where, as here, a dial-a-porn service: (1) offers a pre-recorded sexually explicit message; (2) is available simultaneously on one number to 7,900 or more callers; and (3) has reached several hundred thousand callers per day and tens of millions of callers per year.[12]

---

[12] Considering these facts, there are probably many traditional broadcast radio stations who would be pleased to reach 200,000 or more listeners per day and 100 million per year.

Most if not all of the concerns supporting the ruling in Pacifica are present in the instant case. First, the telephone has certainly established a uniquely pervasive presence in the lives of Americans, and these calls can confront a citizen (including children) not only in public but in the privacy of the home. Amici Rebecca C. was raped by a 12-year-old boy after he accessed the recordings for two and one half hours at a church telephone. So we know that Sable's service, like traditional broadcasting, is uniquely accessible to children who are able to dial the seven-digit numbers. Moreover, while in Pacifica there was no evidence that the radio station advertised, there is evidence here that Sable and others advertise extensively, and that children call these numbers and have been harmed by them. Finally,

as in Pacifica, section 223(b) must be construed under a nuisance rationale where context and all variables must be considered. And as in Pacifica, section 223(b) does not reduce the adult population to what is only fit for children, contrary to Butler v. Michigan, supra. Such materials will continue to be available to adults through other mediums of communication.

3. As construed in its application to the regulation of "indecent" telephone services, section 223(b) is not substantially overbroad.

This Court's overbreadth cases show that section 223(b) is not substantially overbroad. In Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985), this Court reversed the Ninth Circuit's decision to invalidate the Washington obscenity statute in its

entirety on "overbreadth" grounds.[13] The Court discussed the proper analysis for an "overbreadth" challenge, particularly one raised prior to the effective date or enforcement of the law. In support of its holding, this Court cited the following rules governing federal courts in the context of a facial challenge to a statute:

---

[13] In a pre-enforcement challenge, the Ninth Circuit invalidated the statute based on what it considered to be an improper definition of "prurient interest." This Court ruled that it would be improper to define "prurience" in terms of "lust," if the term "lust" referred to normal and healthy sexual desires. However, the Court stated further:

> Even if the statute had not defined prurience at all, there would have been no satisfactory ground for striking the statute down in its entirety because of invalidity in all of its applications.

472 U.S. at 505.

> We call to mind two of the cardinal rules governing the federal courts: "'[o]ne, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other, never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'"

Id. at 501 (quoting United States v. Raines, 362 U.S. 17, 21 (1960)). The Court also stated:

> Nor does the First Amendment involvement in this case render inapplicable the rule that a federal court should not extend its invalidation of a statute further than necessary to dispose of the case before it.

472 U.S. at 502. Finally, and most important, the Court ruled that the Ninth Circuit erred in holding the Broadrick v. Oklahoma, 413 U.S. 601 (1973), "substantial overbreadth" requirement inapplicable in a case where "pure speech" is at issue. 472 U.S. at 503 n.12 (citing New York v. Ferber, 458

U.S. 747, 772 (1982)). In New York v. Ferber, relied on by the Court in Brockett, the Court upheld a New York statute prohibiting depictions of sexual performances by children (i.e., child pornography). The statute was attacked on overbreadth grounds, based on the contention that it would prohibit the dissemination of material which is not legally obscene. In rejecting this attack, and in holding that child pornography need not be obscene to be proscribed, the Court reaffirmed its holding in Broadrick v. Oklahoma, stating:

> [W]e believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.

458 U.S. at 770 (quoting Broadrick, 413 U.S. at 615) (Emphasis added).

In rejecting the overbreadth challenge, this Court stated that the overbreadth would not be "substantial" if the statute covered a "whole range of easily identifiable and constitutionally proscribable" conduct (458 U.S. at 770 n.25); if the statute regulated a "central core of constitutionally regulable conduct" (458 U.S. at 771 n.26); or unless "it reaches a substantial number of impermissible applications." (458 U.S. at 771).[14] Finally, if the overbreadth is not "substantial," the Court expressed its preference for

---

[14] The Court also recognized that:

> It is difficult to think of a law that is utterly devoid of potential for unconstitutionality in some conceivable application.

458 U.S. at 772 n.27 (quoting Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844, 859 (1979)).

curing whatever overbreadth may exist in a statute "'through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied.'" 458 U.S. at 773-74 (quoting Broadrick, 413 U.S. at 615-16).

This position was reemphasized recently in two rulings of this Court, New York State Club Assn. v. City of New York, 487 U.S. ____, 108 S.Ct. 2225, 101 L.Ed.2d 1 (1988)(upholding a New York City law forbidding discrimination by places of "public accommodation, resort or amusement"); and Frisby v. Schultz, 487 U.S. ____, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988) (upholding a picketing ordinance prohibiting such activity in front of a residence or dwelling). In New York State Club Assn., 101 L.Ed. 2d at 16-17 (quoting Broadrick v. Oklahoma) the Court

stated concerning the facial overbreadth challenge:

> A law is constitutional unless it is "substantially overbroad." . . . To succeed in its challenge, appellant must demonstrate from the text of the law and from actual fact that a substantial number of instances exist in which the law cannot be applied constitutionally.

(Emphasis added). In Frisby, the Court discussed the "plain error" of the Ninth Circuit in Brockett v. Spokane Arcades, and stated concerning Brockett and similar cases:

> To the extent they endorsed a broad reading of the ordinance, the lower courts ran afoul of the well-established principle that it will be interpreted to avoid constitutional difficulties.

101 L.Ed.2d at 430. In Frisby, the Court gave the ordinance a narrow and constitutional construction, refusing to address allegedly unconstitutional

hypothetical applications, and thus rejecting the facial overbreadth challenge. These two timely decisions obviously reaffirm the "substantial overbreadth" doctrine, indicate that it is Sable's burden to demonstrate "substantial overbreadth," and reaffirm the principle that the statute at issue will be interpreted narrowly by this Court to avoid constitutional difficulties.[15]

---

[15] See also, L. Tribe, American Constitutional Law, § 12-88 (1988), where he states:

> Implicit in overbreadth analysis is the notion that a law should not be voided on its face unless its deterrence of protected activities is substantial.

Further:

> The key development has been the Court's greater reluctance to strike a law down altogether because of its potential to deter protected expression, and its greater willingness to allow state courts to narrow statutes in the application process.

As in Ferber, the matter before this Court is one where the statute's "legitimate reach dwarfs its arguably impermissible applications." 458 U.S. at 773. As previously discussed, Sable's telephone business is one which is currently available to millions of callers (adults and children), who can simultaneously obtain access to these recordings across the country, the content of which was recently described by the Ninth Circuit Court as "smut" and "salacious." Carlin Communications, Inc. v. Mountain States Tel. & Tel., 827 F.2d at 1292. Moreover, Congressional intent is clear that the "indecency" proscription of the statute is to be applied consistently with Pacifica and other relevant precedents. As so construed, section 223(b) will only proscribe "indecent" material defined as: "language that describes

sexual or excretory organs and activities, in terms patently offensive as measured by contemporary community standards for the . . . [telephone] medium." 438 U.S. at 732. In addition, because Pacifica upheld the "indecency" standard based on a nuisance rationale where context is all-important, section 223(b) must be applied considering the "host of variables" surrounding the particular telephone transmissions at issue. As so construed, section 223(b) cannot be found substantially overbroad, and whatever overbreadth may possibly exist should be dealt with in the future on a case-by-case basis relating to particular factual situations.

C. Section 223(b) is Not Directed at a Particular Viewpoint. It Proscribes Only the Mode or Form of Expression, Not the Ideas the "Indecent" Language May Purport to Convey.

It is important to recognize that section 223(b) is not directed at a particular viewpoint. It proscribes only the mode or form of expression, not any ideas the "indecent" language may purport to convey. If the speaker is concerned with ideas, he can escape penalty by expressing them in some other form. This Court has recognized that content is separable from form and that other modes of expression are virtually always available. Restrictions on "indecent" speech do not preclude advocacy of any ideas such speech might otherwise convey. For example, prohibitions on "indecent" telephone recordings may be compared with a lawyer who, in open court, addresses the judge in "indecent" terms. Rules against that sort of speech will undoubtedly be enforced by the judge (holding lawyer in contempt). The

Court recognizes that other more acceptable means of objecting to the judge are available and the lawyer must use them. As the Court stated in Pacifica:

> A requirement that indecent language be avoided will have its primary effect on the form, rather than the content, of serious communications. There are few, if any, thoughts that cannot be expressed by the use of less offensive language . . ..

438 U.S. at 743 n.18.

D. Where the Interests of Children are at Stake the Government is Fully Justified in Regulating Nonobscene Speech.

Since March of 1983, when dial-a-porn was first commercially marketed, countless children have been exposed to it. It constitutes an attractive nuisance in every home in America where children are present. Indeed, there is no completely effective way to prevent

children from being exposed to "indecent" dial-a-porn so long as it is lawfully and commercially marketed.

This Court has repeatedly held that where the interests of children are at stake the government is fully justified in regulating nonobscene material. This significant governmental interest in the protection of minors has been identified in numerous cases. See, Prince v. Massachusetts, U.S. 158, 168 (1944) ("[a] democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens"); New York v. Ferber, 458 U.S. at 756-57 ("a state's interest in 'safeguarding the physical and psychological well-being of a minor'" is "compelling" and justifies banning nonobscene sexually explicit depictions of minors);

F.C.C. v. Pacifica, 438 U.S., at 749 (government interest in the "well-being of its youth" sufficient to ban all "indecent" broadcasting to children, as well as adults).

In Ginsberg v. New York, supra, this Court upheld a ban on the distribution of nonobscene sexually explicit material to children. The prohibition on distribution of such "indecent"[16] material to children is supported by the exact same interest present when "indecent" dial-a-porn is exposed to children. The "governments' interest in the 'well-being of its youth' and in supporting '[parents'] claim to authority in their own house-

---

16 "Bookstores and motion picture theatres for example, may be prohibited from making indecent material available to children." F.C.C. v. Pacifica Foundation at 749 (explaining Ginsberg)(Emphasis added).

hold' justified the regulation of otherwise protected expression." Pacifica at 749; Ginsberg at 639-40. The Court in Ginsberg elaborated on these compelling interests. There were two governmental interests which justified limitations on the availability of sexually explicit ("indecent") material to children. First, the Court noted that "constitutional interpretation has consistently recognized that the parents' claim to authority in their household to direct the rearing of their children is basic in the structure of our society," and that parents and others responsible for children's well-being "are entitled to support of laws designed to aid discharge of that responsibility." Id. at 639. Second, the Court stated that "government has an independent interest in the well-be-

ing of its youth." Id. at 640. The Court declared that:

> While the supervision of children's reading may best be left to their parents, the knowledge that parental control or guidance cannot always be provided and society's transcendent interest in protecting the welfare of children justify reasonable regulation of the sale of material to them. It is, therefore, altogether fitting and proper for a state to include in a statute designed to regulate the sale of pornography to children special standards, broader than those embodied in legislation aimed at controlling dissemination of such material to adults.

Id. Indeed, Justice Stewart, in his concurring opinion in Ginsberg, provided an additional theoretical justification for stricter regulation of dissemination of sexually explicit "indecent" material to minors.

> I think a State may possibly determine that, at least in some precisely delineated areas, a child -- like someone in a captive audience -- is not possessed of that

> full capacity for individual choice which is the presupposition of First Amendment guarantees.

Id. at 649-50 (Stewart, J., concurring). As the Court more recently stated, the government's interest in "safeguarding the physical and psychological well-being of a minor" is "compelling." New York v. Ferber at 756-57 (Emphasis added).

Given the nature of the commercial dial-a-porn problem, "society's right to 'adopt more stringent controls on communicative materials available to youths than on those [only] available to adults'" is fully warranted. Pacifica at 757 (Powell, J. concurring)(quoting Erznoznik v. Jacksonville, 422 U.S. 205, 212 (1975)); See also, Miller v. California, 413 U.S. at 36 n.17; Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 690

(1968); Jacobellis v. Ohio, 378 U.S. 184, 195 (1964).

E. Butler v. Michigan Does Not Foreclose a Prohibition on Commercial "Indecent" Telephone Recordings. Adults Can Easily Obtain Such Recordings Elsewhere.

Butler v. Michigan, 352 U.S. 380 (1957), is cited by Sable as foreclosing the instant statute since it forbids Congress from reducing adults to hearing only what is suitable for minors. An analysis of Butler shows that it is not a bar to an "indecency" proscription in the telephone medium. Butler can readily be distinguished from the instant case.

In a brief opinion, the Court in Butler struck down a criminal conviction under a manifestly overbroad Michigan statute that forbade the publication, sale, or other distribution of any publication, writing, picture:

> or other thing, including any recordings, containing obscene, immoral, lewd or lascivious prints, pictures, figures or descriptions, tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth. . .

Id. at 381. The Court properly ruled that the law was overbroad and "not reasonably restricted to the evil with which it is said to deal." Id. at 383.[17]

The more recent Pacifica Court limited the Butler case by distinguishing it. In a real sense, of course, Pacifica bans the broadcast of "indecent" material to adults as well as children. However, the Court ruled that unlike Butler, the F.C.C.

---

[17] It is significant to note that Michigan had another statute specifically proscribing the distribution of erotic materials to minors, but that statute was not before the Court. Butler at 383.

order did not "reduce adults to hearing only what is fit for children" because adults "may purchase tapes and records or go to theatres and nightclubs to hear these words." Pacifica at 750 n.28; and see Powell, J. (concurring) at 760 ("the Commission's holding does not prevent willing adults from purchasing Carlin's ["indecent"] records, from attending his performances, or, indeed, from reading the transcript reprinted as an appendix to the Court's opinion"). Clearly, this analysis is squarely applicable to "indecent" recordings heard over the telephone. They are easily available to adults from other sources and their removal from the telephone (where they are exposed to children) would not "reduce adults to hearing only what is fit for children." Indeed, this Court itself analogized "indecent" broadcasting with

"indecent" telephone language, stating that neither is given "constitutional immunity" to "avoid a harm that has . . . taken place." Id. at 749. The Court cited as justification for its holding the need for newly enacted Congressional legislation against "obscene or profane" telephone language. Id. at 749 n.27.

It is essential to remember that the Butler statute prohibited the distribution of all material "unsuitable" for minors, no matter what the source or media. It made it impossible for adults to obtain the material anywhere in the state. As in Pacifica, the dial-a-porn prohibition would deal only with one medium which is uniquely hurtful to children. As Justice Powell stated in his Pacifica concurrence:

In most instances, the dissem-

> ination of this kind of degrading speech to children may be limited without also, limiting willing adults access to it. Sellers of printed and recorded matter and exhibitors of motion pictures and live performances may be required to shut their doors to children, but such a requirement has no effect on adults' access . . .. The difficulty is that such a physical separation of the audience cannot be accomplished in the broadcast [or telephone] media . . .. [B]oth adults and unsupervised children are likely to be in the broadcast [or dial-a-porn] audience, and the broadcaster cannot reach willing adults without also reaching children.

Id. at 758-59 (Powell, J. concurring) (Emphasis added). Justice Powell went on to state that "[t]his, as the Court emphasizes, is one of the distinctions between" such media and others "justifying a different treatment . . . for First Amendment purposes." Id.

As in Pacifica, the prohibition of "indecent" dial-a-porn involves a

limited form of regulation of a single medium whose adult and youth audiences cannot be physically separated. Butler, on the other hand, applied to all media and embraced a wide-ranging (and vaguely defined) subject matter. Moreover in Butler, dissemination of the materials to children could generally be controlled at the point of distribution without denying access to willing adults. This is impossible with broadcast radio (as in Pacifica) and dial-a-porn.

II. CONGRESS MAY PROHIBIT OBSCENE DIAL-A-PORN RECORDINGS.

Without question, obscene speech is not protected by the First Amendment. Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985); Miller v. California, 413 U.S. 15 (1973). Hence, the government may lawfully prohibit its distribution, whether telephon-

ically or through other media. Kaplan v. California, 413 U.S. 115 (1973). See also, United States v. Lampley, 573 F.2d 783 (3rd Cir. 1978)(upholding constitutionality of pre-1983 47 U.S.C. § 223); 50 A.L.R. Fed. 525

The Ninth Circuit Court of Appeals in Carlin Communications v. Mountain States Tel. & Tel., 827 F.2d at 1294 ruled that a telephone company was subject to criminal prosecution under state obscenity laws for choosing to carry dial-a-porn. "Mountain Bell faces . . . potential criminal liability for carrying Carlin's messages under state obscenity laws."

Further, the fact that Sable is subject to violations in multiple communities with varying community standards does not vitiate the statute. This Court dealt with this precise issue in

Hamling v. United States, 418 U.S. 87 (1974). In Hamling, the Court contemplated that conduct overlapping into multiple judicial districts subjected obscenity violators to varying local standards, depending on the locality of trial. In language squarely on point:

> The fact that distributors of allegedly obscene materials may be subjected to varying community standards in the various federal judicial districts into which they transmit the materials does not render a federal statute unconstitutional because of the failure of application of uniform national standards of obscenity. Those same distributors may be subjected to such varying degrees of criminal liability in prosecutions by the states for violations of states' obscenity statutes; we see no constitutional impediment to a similar rule for federal prosecutions.

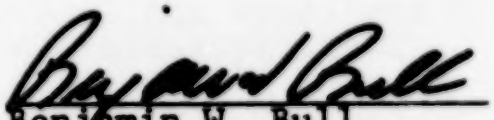
Id. at 106. And see Miller v. California, 413 U.S. at 24, 32; United States v. Sandy, 506 F.2d 210, 218 (6th Cir. 1979) ("Having voluntarily

chosen to enter a conspiracy of national scope, appellant's limited their right to be tried according to the standards of the localities in which their operations are centered.")

CONCLUSION

For the foregoing reasons this Court should hold that the provisions of 47 U.S.C. § 223(b) pass constitutional muster.

Respectfully submitted,



Benjamin W. Bull
2845 E. Camelback Rd.
Suite 740
Phoenix, Arizona 85016
(602) 381-1322

Counsel for
Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief of Amici Curiae Citizens for Decency through Law, Inc., the Christian Life Commission of the Southern Baptist Convention, and Rebecca C., infant, by and through her parents Paulette Callen and Gary Callen, have been sent by U.S. Mail, Postage Prepaid, on this 22 day of February, 1989, to:

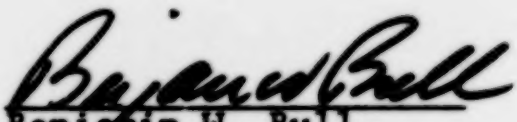
Richard K. Simon, Esq.
Counsel of Record
2029 Century Park East
Suite 3800
Los Angeles, CA 90067

Counsel for Appellees
and Cross-Appellants

William C. Bryson
Solicitor General
Department of Justice
Washington, D.C. 20530

Counsel for Appellants
and Cross-Appellees

All parties required to be served have been served.



Benjamin W. Bull
Counsel for
Amici Curiae